

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH 1999 SESSION

FILED

April 21, 1999

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellant,)
)
 VS.)
)
 ROBERT DEWAYNE CRISWELL,)
)
 Appellee.)

NO. 01C01-9804-CR-00163

SUMNER COUNTY

HON. JANE WHEATCRAFT,
JUDGE

(Dismissal of Indictment)

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OPINION FILED: _____

REVERSED AND REMANDED

JOE G. RILEY,
JUDGE

OPINION

The state appeals the dismissal of defendant's indictment on the basis of the statute of limitations. In December 1997, the Sumner County Grand Jury returned an indictment against defendant charging him with misdemeanor stalking of his ex-wife between July 1996 and July 1997. Defendant's motion to dismiss the indictment based upon the expiration of the statute of limitations was granted by the trial court. This Court concludes the trial court erred, and **REVERSES** and **REMANDS** for further proceedings.

I. PROCEDURAL HISTORY

In July 1997, defendant's ex-wife signed a warrant charging him with stalking her since their divorce in July 1996. The case was bound over to the Grand Jury which returned a true bill against defendant on December 3, 1997. The indictment alleged criminal conduct by defendant "between . . . July, 1996 and July, 1997."

In the trial court, defendant moved to dismiss the indictment. He argued that the statute of limitations had expired since (1) part of the alleged criminal conduct took place outside the twelve-month period prior to issuance of the indictment, and (2) the state failed to plead facts necessary to toll the limitations period. The state argued in the trial court that the arrest warrant issued in July 1997 timely commenced the prosecution and tolled the statute of limitations.

Defendant then argued that the warrant relied upon by the state was void. In response, the state asserted the warrant's sufficiency and argued that attacks on the warrant were foreclosed by return of the indictment.

The trial court ordered the indictment dismissed pursuant to the statute of limitations. The state appeals and now contends simply that the indictment, on its face, survives a statute of limitations challenge. We agree with the state's argument.

II. WAIVER

Defendant argues that the state waived the issue of the indictment's facial validity by failing to raise it in the trial court. In the trial court, and in its declaration of issues, the state confined its argument to the warrant as the vehicle of timely commencement of prosecution. While this Court does not ordinarily address a legal theory raised for the first time on appeal, we may "in the exercise of [our] discretion, consider an issue which has been waived . . . due to a change in legal theory." State v. Adkisson, 899 S.W.2d 626, 636 (Tenn. Crim. App. 1994); see also Tenn. R. App. P. 13(b).

In this instance, we choose to exercise that discretion and address the validity of the indictment. Although not recognized by the parties in the trial court, it is apparent that the indictment itself, irrespective of the warrant, was a timely commencement of the prosecution.

III. VALIDITY OF THE INDICTMENT

A. Sufficiency of the Warrant

As stated, arguments in the trial court focused on the sufficiency of the underlying arrest warrant issued in July of 1997. Defendant claimed, and continues to claim, that the *warrant* was void on its face for failing to list the elements of the offense and failing to reflect the date of issuance. However, as will be discussed below, the December 1997 *indictment* is timely on its face. Therefore, the validity of the warrant is, in our view, irrelevant to the determination of the issue.

B. Statute of Limitations

The indictment was returned December 3, 1997, and alleged stalking "between . . . July, 1996 and July, 1997." Defendant argues that "[t]here is no showing on the face of the indictment that two of the acts occurred within the one-year period. If there were acts within the period, the State could have moved to amend or could have obtained a superseding indictment." However, "[o]ffenses which are continuous in nature can be prosecuted if even part of the offense occurred within the limitations period, notwithstanding the fact that part of the

offense also occurred outside the period.” Raybin, *Tennessee Criminal Practice and Procedure* § 16.83 (1984); see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); State v. Thorpe, 614 S.W.2d 60, 64 (Tenn. Crim. App. 1980)(citations omitted).

Defendant was charged with stalking which is a continuous offense based upon a repeated course of conduct. State v. Hoxie, 963 S.W.2d 737, 743 (Tenn. 1998); see Tenn. Code Ann. § 39-17-315. “When an offense is based on a series of acts performed at different times, the period of limitations starts at the time when the last such act is committed.” 22 C.J.S. *Criminal Law* § 199 (1989).

Defendant contends the state was required to allege in the indictment the specific facts tolling the statute of limitations. However, the indictment in this case was not “facially late;” therefore, it was unnecessary to allege tolling facts. See State v. Messamore, 937 S.W.2d 916, 919 (Tenn. 1996).

The December 1997 indictment in the instant case alleged criminal conduct between July 1996 and July 1997. This assumes that the last act comprising defendant’s stalking behavior occurred in July 1997. Thus, the twelve-month statute of limitations on this crime had not expired when the indictment was returned six months later. Although this Court in State v. Thorpe affirmed the dismissal of a facially valid indictment, the parties’ stipulation indicated that the last act was committed outside the statute of limitations. 614 S.W.2d at 64. There is no such stipulation in the case *sub judice*. Dismissal of the indictment under the circumstances of this case is not proper.

CONCLUSION

Based upon the foregoing, it is unnecessary for this Court to address whether the warrant timely commenced prosecution of this offense, because the December 1997 indictment, on its face, alleged criminal conduct within the preceding twelve months. Therefore, the trial court erred in dismissing the indictment based upon the statute of limitations.

We **REVERSE** the dismissal of the indictment and **REMAND** the case for

further proceedings.

JOE G. RILEY, JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

JOHN EVERETT WILLIAMS, JUDGE